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TO GROW STRONG TREES START WITH GOOD SOIL: OMBUDSMEN & FOUNDATIONS FOR PUBLIC ACCOUNTABILITY IN VANUATU & THE PACIFIC

NARELLE BEDFORD*

Samari

Stamba tingting long toktok blong Article ia hemi stap givim wan lukluk long fasin blong Ombudsman insaed long region blong Pacific Islands we hemi lukluk moa long public accountability long Vanuatu. Public Accountability hemi stap minim se yumi lukluk long ol fasin blong pipol mo hao yumi usum mane blong gavman. Blong gat wan Ombudsman hemi wan gudfala model blong yumi long Pacific Aelan.

Précis

Cet article est un étude de cas de l'Ombudsman (ou Médiateur) dans la région du Pacifique, avec un aperçu sur la responsabilité publique au Vanuatu. La création d'un Ombudsman ou Médiateur est devenue un modèle dominant dans la région du Pacifique. L'article conclut que fournir une base solide pour la responsabilité publique peut être une question complexe avec beaucoup de différents éléments et approches possibles.

INTRODUCTION

The importance of public accountability and need for integrity in government decision-making has been accepted in legal systems generally and this holds true in the Pacific.¹ Public accountability in this context refers to the public law aspiration to safeguard a fair and just society and the accompanying mechanisms which ensure that legislation, decisions, and actions of government are made in accordance with law. Throughout this

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¹ See generally Michael Dowdle, *Public Accountability: Designs, Dilemmas and Experiences* (Cambridge University Press, 2006); Morgan Wesley, 'Overlapping Authorities: Governance, Leadership and Accountability in Contemporary Vanuatu' (2013) 15 *Journal of South Pacific Law* 1.

analysis the concept of requiring governments to be responsible for their actions and decisions is termed ‘public accountability’. It is closely related to the concept of good governance, which draws a broader circle than the traditional meaning ascribed to government and includes the ‘traditions, institutions, mechanisms and processes that determine how power is exercised’ as well as the role of citizens and non-government organisations.² This analysis will focus on public accountability through Ombudsmen in the Pacific, featuring a detailed case study on Vanuatu and the role of its Ombudsman. The paper will argue that constitutional embedding of key accountability institutions can provide a basis for the development of a culture of accountability and a foundation to build future improvements upon. The development of a culture of accountability also requires a broad, complex network of institutions and people and this wider system operating within Vanuatu will also be explored.

For the purposes of this article, analysis will be focused on those 12 nations and territories which participate in the University of the South Pacific (USP) and also Papua New Guinea (PNG).³ The aim in selecting these 13 nations and territories was to generate a discussion about public accountability whilst also illustrating there is no one model that is a perfect template. While there are many ways to define the “pacific” – the use of USP provides a practical starting point and PNG has been included to offer comprehensive analysis.

PNG and the 12 USP member nations and territories have all evolved with a pluralistic legal system which entwines formal written laws with customary law.⁴ In these pluralistic legal systems, doctrines such as rule of law and separation of powers provide a theoretical basis for public accountability.⁵ In addition to these fundamental doctrines, some Pacific nations and territories have also evolved various complementary institutions to uphold and provide further strength to public accountability principles. Classically, a constitution (whether written or unwritten) may exist as the supreme source of law in the nation.⁶ Additional

² Graham Hassall, ‘Governance, Legitimacy and the Rule of Law in the South Pacific’ in Anita Jowitt and Dr Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU Press, 2010) 51.

³ The 12 members are Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu & Vanuatu.

⁴ Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Intersentia, 4th ed, 2017) 6.

⁵ Sir John Muria, ‘The Role of the Courts and Legal Profession in Constitutional and Political Disputes in the Pacific Islands Nations’ (Address at the Graduation Celebration, University of South Pacific, Emalus Campus, Port Vila Vanuatu, 4 December 2001).

⁶ Jennifer Corrin-Care, ‘Cultures in Conflict: The Role of the Common Law in the South Pacific’ (2002) 6 *Journal of South Pacific Law* 1.

institutions such as the Ombudsman, Auditor-General and Human Rights Commissions may also exist.⁷ Other institutions that can be considered part of the broad accountability system given their potential roles in enforcing and remedying corruption in public office are Public Prosecutors and Public/Legal Aid Solicitors; and for their role in recommending potential reforms, the Law Reform Commissions. All of these various institutions have important roles and functions; however, the primary focus of this analysis will be the Ombudsman.

The appeal of an independent investigatory body such as an Ombudsman can be demonstrated by the creation of and continuing existence of Ombudsmen (or similar institutions) across common law, civil law and countries with pluralistic legal systems. While the nomenclature (for example the Ombudsman equivalent in France, and French territories, is the *le Médiateur de la République*) and the role and functions may differ, the essential characteristics of these Ombudsmen are enduring. Those essential characteristics include impartiality from government; investigatory capacity based upon complaints from the public and other referrals; a public reporting capability; and most significantly the power to self-initiate investigations.⁸ Impartiality and independence are crucial features that have been identified as the original impetus for the adoption of the Ombudsman model in the Pacific.⁹

Within the broad framework of Pacific Ombudsmen, Vanuatu has been selected for particular examination as it is a nation that is relatively young and independent with a pluralistic legal system (incorporating both common and civil law legacies and ‘*Kastom*’ (customary law) in its history and modern governance).¹⁰ It has been described as having a ‘modified Westminster system’ and as being ‘one of the most culturally diverse nations of the world’.¹¹ Vanuatu exists as a classic example of a hybrid legal system (incorporating common law, civil law and *Kastom*), and of particular interest for this analysis it is a hybrid legal system

⁷ Recognising the challenge of resource constraints in Pacific islands, Jowitt and Hicks proposed a Rights Commissioner attached to the Public Solicitors Office as an alternative to a Human Rights Commission in Anita Jowitt and Nena Hicks, ‘Human Rights and Transparency of Government Action in Vanuatu – A Comment (1997) 1 *Journal of South Pacific Law* 1.

⁸ For a detailed consideration of the Australian Ombudsman’s own motion powers, see Anita Stuhmcke, *An Empirical Study of the Systemic Investigations Function of the Commonwealth Ombudsman from 1977-2005* (PhD Thesis, Australian National University, 2009).

⁹ Justice Tuiloma Neroni Slade, ‘Law Officers in Pacific Island States’ (1988) 14 *Commonwealth Law Bulletin* 1433, 1442.

¹⁰ For further detail on the legal system and the place of *Kastom* in Vanuatu see Miranda Forsyth, *A Bird that Flies with Two Wings: The Kastom and State Justice Systems in Vanuatu* (2009, ANU epress) & Bule H, ‘Law and Custom in Vanuatu’ (1986) 2 *Queensland Institute of Technology Law Journal* 129.

¹¹ Benedict Sheehy and Jackson Nyamuya Maogoto, ‘Constituting Vanuatu: Societal, Legal and Local Perspectives’ (2008) 16 *Asia Pacific Law Review* 133, 133, 138.

which has operated with an Ombudsman enshrined in its written constitution.¹² The article will consider the specific provisions of the Vanuatu constitution that enshrine public accountability principles and establish public accountability mechanisms and institutions. The specific institution of the Ombudsman will be considered in detail, and relatedly the *Leadership Code Act 1998*.

Other topics to be covered in this analysis (although in less detail than the Ombudsman) will be the recent implementation of a national right to an information system in Vanuatu,¹³ and the other public accountability institutions in Vanuatu. As Rawlings concluded, ‘oversight agencies cannot be examined in isolation. They must be conceptualised relationally within the law and justice sector as a total package of regulatory institutions’.¹⁴ A holistic approach to the role of the Ombudsman in the broader public accountability system recognises that non-government organisations, academics and the press as well as formal regulatory institutions are all important in generating a culture of accountability.

Finally, for comparative purposes a mapping exercise will be undertaken to chart the current approach to Ombudsmen or equivalent institutions in other USP members and in PNG. The article will then provide some concluding observations about the strong foundation that constitutional enshrinement can offer both as a basis for empowering and protecting the Ombudsman and also its contribution to a culture of public accountability in the Pacific.

CASE STUDY: VANUATU

The structure and significance of the Vanuatu constitution

The foundational public law doctrine of the separation of powers has been given practical effect in the structuring of power in written constitutions throughout most of the Pacific.¹⁵ The *Constitution of the Republic of Vanuatu 1980* (‘the *Constitution*’) continued this approach, but with an indigenous adaptation to recognise Vanuatu’s unique history prior to independence. Thus, the *Constitution* is divided into various chapters, containing the

¹² On hybridity, see generally Sean Donlan, ‘To Hybridity and Beyond: Reflections on Legal and Normative Complexity’ in Vernon Palmer, Mohamed Y. Mattar and Anna Koppel (eds), *Mixed Legal Systems, East and West* (Routledge, 2015) 17; Sue Farran, ‘Pacific Punch: Tropical Flavours of Mixedness in the Island Republic of Vanuatu’ in Vernon Palmer, Mohamed Y. Mattar and Anna Koppel (eds), *Mixed Legal Systems, East and West* (Routledge, 2015) 123.

¹³ See *Right to Information Act 2016, Act No.13 of 2016*.

¹⁴ Gregory Rawlings, ‘Regulating Responsively for Oversight Agencies in the Pacific’ in *State Society in Melanesia Project* (February 2006, ANU Epress) 1.

¹⁵ Corrin and Paterson, above n 4, 86.

traditional three branches under the separation of powers, with Parliament in Chapter 4, the Executive in Chapter 7, and the Judiciary in Chapter 8. Several notable unique refinements were added to the written constitution adopted in Vanuatu. Most notable is the priority and importance accorded to the National Council of Chiefs in Chapter 5, which is located immediately after Parliament in the *Constitution*. Section 30 of the *Constitution* provides that the National Council of Chiefs ‘has a general competence to discuss all matters relating to custom and tradition and may make recommendations for the preservation and promotion of ni-Vanuatu culture and languages and it may be consulted on any question, particularly any question relating to tradition and custom, in connection with any bill before Parliament’. These provisions ensure that there is a constitutionally embedded role for the National Council of Chiefs in Vanuatu.

Within Vanuatu’s pluralistic system, the provisions of Chapter 1 of the *Constitution* titled ‘The State and Sovereignty’ are a necessity.¹⁶ In section 2, the *Constitution* is proclaimed to be the ‘supreme law of the Republic of Vanuatu’, thus clearly recording that in the event of any inconsistency between laws, including *Kastom*, the *Constitution* will prevail. Section 3 states that Bislama is the national language, while Bislama, English and French are the official languages. Representative government is entrenched in section 4 which declares that ‘national sovereignty belongs to the people of Vanuatu which they exercise through their elected representatives’.

Written constitutions typically contain provisions prescribing the necessary process to be followed for amending the constitution. Such provisions are contained in Chapter 14 of the *Constitution*, which prescribes that at least a two-thirds majority is needed to pass a Bill to amend the *Constitution* and this requires a quorum of at least three quarters of the Members of Parliament to be present and voting.¹⁷ Furthermore, in three crucial subject areas - language status, electoral system and the Parliamentary system - the *Constitution* provides that it can only be amended if a Bill has first achieved simple majority support in a national referendum.

Written constitutions were common in nations in the Pacific Islands upon attaining independence¹⁸ and as such, in part could be regarded initially as aspirational in nature. This

¹⁶ This chapter contains provisions on supremacy of laws, languages, national sovereignty, electoral franchise and political parties.

¹⁷ *Constitution of the Republic of Vanuatu 1980* s 85.

¹⁸ Corrin and Paterson, above n 4, 84.

is evidenced by the fact that many nations took a period of time to fully implement provisions contained in constitutions. It is argued that this was the actual situation in Vanuatu in respect of two key constitutional provisions which assist to enshrine the concept of public accountability – the Ombudsman and the *Leadership Code*. The *Constitution* was adopted in 1980, and yet laws to give effect to these two elements did not pass Parliament for well over a decade.

The Vanuatu Ombudsman

The *Constitution* contains specific provisions entrenching the office of the Ombudsman and giving it constitutional status.¹⁹ The significance of this is that if the Ombudsman was not constitutionally established the other alternative would be to establish the institution through the provisions of a normal piece of legislation. By nature, normal legislation can be more easily amended or repealed by a simple majority vote in Parliament compared to the process outlined above for a constitutional provision. This entrenchment in the *Constitution* thus provides a strong signal about the intent of independence leaders to have an enduring Ombudsman institution and accords it enhanced democratic protection.²⁰

Furthermore, the *Constitution* mandates that wide consultation, including with the National Council of Chiefs and the Local Government Councils (and other senior leaders and office-holders) takes place before the appointment of an Ombudsman.²¹ This provides another layer of democratic protection through requiring consent by a broad range of senior ni-Vanuatu leaders.

The powers of the Ombudsman to make enquiries may be engaged as a result of a complaint from a member of the public; a request by a Minister, a Member of Parliament, the National Council of Chiefs or a Local Government Council or, most significantly, by the initiative of

¹⁹ Chapter 9 ‘Administration’, Part II ‘The Ombudsman’, ss 61-5.

²⁰ See generally Devika Prasad, ‘Strengthening Democratic Policing and Accountability in the Commonwealth Pacific’ (2006) 5 *International Journal on Human Rights* 109, 116; *Ombudsman v Batick*; *Ombudsman v Jimmy* [2001] VUSC 45
<[http://www.pacii.org/cgibin/sinodisp/vu/cases/VUSC/2001/45.html?stem=&synonyms=&query=title\("2001%20VUSC%2045"\)>](http://www.pacii.org/cgibin/sinodisp/vu/cases/VUSC/2001/45.html?stem=&synonyms=&query=title().

²¹ Specifically, s 61(1) of the *Constitution* provides that the Ombudsman is appointed by the President in consultation with the Prime Minister, Speaker, leaders of political parties represented in Parliament, Chairman of National Council of Chiefs, Chairman of Local Government Councils & Chairmen of Public Service Commission & Judicial Services Council.

the Ombudsman.²² Importantly, section 65 of the *Constitution* explicitly states that the Ombudsman is not subject to direction or control by any other person, thus providing significant constitutional protection of institutional independence. The Ombudsman is conferred jurisdiction to enquire into all public servants, public authorities and ministerial departments.²³ The remaining constitutional provisions cover reports of the Ombudsman and a right of citizens to access services by the administration (or executive) of Vanuatu in their own language.²⁴ In the latter, the *Constitution* confers a unique and central role on the Ombudsman in enforcing multilingualism in Vanuatu which further requires that there must be an annual report to Parliament on the observance of multilingualism and measures to ensure respect of the same. In totality, these Ombudsman powers have been considered as ‘broad’ and encompassing ‘a wider role’ when compared to Ombudsman in other nations.²⁵ As Crossland noted ‘... the nature of the Ombudsman's functions is more akin to an anti-corruption commission than the orthodox model of an Ombudsman.’²⁶

To supplement these constitutional provisions, in 1995 the Parliament of Vanuatu passed the *Ombudsman Act*.²⁷ However, the first Ombudsman was appointed in 1994, relying upon the constitutional provisions for jurisdiction and authority until the substantive Act was passed.²⁸ The first Ombudsman was the subject of a number of court cases, which cumulatively produced a body of Vanuatu Supreme Court jurisprudence on the powers of the Ombudsman.²⁹ Each case was ultimately unsuccessful in challenging the constitutional

²² *Constitution of the Republic of Vanuatu 1980* s 62(1); *Ombudsman v Kalsakau* [1997] VUSC 30 <[http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/30.html?stem=&synonyms=&query=title\("1997%20VUSC%2030"\)](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/30.html?stem=&synonyms=&query=title()>.

²³ *Constitution of the Republic of Vanuatu 1980* s 62(2), but not the President of the Republic, the Judicial Service Commission or the Supreme Court and other judicial bodies.

²⁴ *Ibid* ss 64-5.

²⁵ Mareva Betham-Annandale, ‘A Comparison and Contrast of the Role of the Ombudsman in Vanuatu and Samoa: Who, What & How can they Investigate?’ (1997) 1 *Journal of South Pacific Law*; Rene Lal, ‘The Diversified or Strict Role of an Ombudsman: A Comparison in the Roles of the Ombudsman in Vanuatu & Fiji’ (1997) 1 *Journal of South Pacific Law*.

²⁶ KJ Crossland, ‘The Ombudsman Role: Vanuatu’s Experiment’ (Discussion Paper No 00/5, The Australian National University Research School of Pacific and Asian Studies) 7.

²⁷ Act 14 of 1995, commencing on 18 September 1995.

²⁸ The first Ombudsman was Marie-Noëlle Ferrieux-Patterson, who served from 1994 until 1999 but was not re-appointed for a further term. Subsequent Ombudsmen have been (listed in order of appointment): Hannington G Alatoa, Peter Taurokoto, Pasa Tosusu and Kalkot Mataskelekele. For a more detailed account of the first Ombudsman’s era see generally Prasad, above n 20, 128; Graham Hassall, ‘South Pacific’ (1998) 9 *Public Law Review* 69, 75.

²⁹ See, eg, *Virelala v Ombudsman* [1997] VUSC 35 <[http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/35.html?stem=&synonyms=&query=title\(Virelala%20and%20Ombudsman%20\)>](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/35.html?stem=&synonyms=&query=title(Virelala%20and%20Ombudsman%20)>); *Ombudsman v Leymang* [1997] VUSC 29 <<http://www.paclii.org/vu/cases/VUSC/1997/29.html?>>; *Ombudsman v Attorney-General* [1997] VUSC 41 <[http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/41.html?stem=&synonyms=&query=title\(Ombudsman%20v%20Attorney-General\)](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1997/41.html?stem=&synonyms=&query=title(Ombudsman%20v%20Attorney-General)>)>.

validity of actions taken by the Ombudsman under the Act. However, as result of these circumstances, the first Act was subsequently repealed and replaced by a new Act in 1998.³⁰ This Act conferred the Ombudsman with a standard range of powers (although Transparency Vanuatu claim the powers were more restrictive compared to the earlier version of the Act) and prescribes procedures to ensure fair treatment.³¹ Hill summarises the second Act as ‘lacking the force of the first Act’ and representing ‘less of a threat to those whose conduct is likely to be scrutinised’.³² According to Hill, key changes in the second Act as compared to the first Act included the staff of the Ombudsman being appointed as public servants, a requirement for notice prior to an investigation, and the obligation in respect of allegations of criminal wrongdoing to detail the alleged offence and provide evidence, combined with an increased role for mediation.³³

The sequence of events spanning the first Act and the second Act does graphically demonstrate the power of the legislature, derived from its status of having been elected by the people of Vanuatu, to shape accountability institutions in the manner of their choosing and it underlines the crucial nature of government support for the Ombudsman to function effectively.

That said, Constitutional enshrinement remains significant as it not only signals a deep national commitment to public accountability, but it also can provide a baseline level of protection for the Ombudsman. The Constitutional provisions dealing with the Vanuatu Ombudsman enabled it to exist and function lawfully in the absence of specific legislation.

The final conclusions and recommendations arising from an investigation by the Ombudsman are formally issued in a written report which is made public, unless it would be contrary to

man%20and%20Attorney-General%20)>; *Ombudsman v Batick*; *Ombudsman v Jimmy* [2001] VUSC 45 <<http://www.paclii.org/vu/cases/VUSC/2001/45.html>>.

³⁰ Act 27 of 1998, commencing on 11 January 1999; *Re the President's Referral, President of the Republic of Vanuatu v Attorney-General* [1998] VUSC 18 <[http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1998/18.html?stem=&synonyms=&query=title\(Presiden t's%20Referral,%20President%20of%20the%20Republic%20of%20Vanuatu%20and%20Attorney-General%20\)>](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1998/18.html?stem=&synonyms=&query=title(Presiden t's%20Referral,%20President%20of%20the%20Republic%20of%20Vanuatu%20and%20Attorney-General%20)>)>. Also, see generally Hassall, above n 28, 71, 74-5.

³¹ Transparency International, *National Integrity System Update – Ombudsman and Office of the Auditor-General*, Update #3. The powers of the Ombudsman are contained in s 11 of the Act. The consequence of a breach of procedures was held in *The Ombudsman v Jimmy* [1996] VUSC 26 to require the withdrawal of the report and the investigation be re-conducted.

³² Edward Hill, ‘The Vanuatu Ombudsman’ in Anita Jowitt and Dr Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU Press, 2003) 78.

³³ *Ibid* 78-9.

public security or the public interest.³⁴ It should be noted that no reports have been published electronically on the Pacific Islands Legal Information Institute's (PacLII) database since April 2012, or on the Vanuatu Ombudsman's website.³⁵ The ability for members of the public to access reports by the Ombudsman is a necessary element in building a culture of transparency, and this is an area on which the Ombudsman needs to take action. It also demonstrates a limitation of constitutional embedding, as there are no constitutional provisions guaranteeing that the work undertaken by the Ombudsman will be made publicly available.

In an important addition to the typical responsibilities of an Ombudsman, the Vanuatu Ombudsman is also empowered to investigate alleged breaches of the *Leadership Code Act 1998*.³⁶ Generally, the most significant limitation of the powers of the Ombudsman (and related offices globally) is that they are traditionally only able to make formal recommendations and cannot compel or enforce action by government. However, the position in Vanuatu is nuanced in respect of the *Leadership Code*, where the Ombudsman can apply to the Supreme Court to enforce compliance with powers of investigation.³⁷ This power is conferred in section 34(5) of the *Leadership Code* and can be utilised to ensure access to Government contracts, documents, books, accounts and any other material relevant to an investigation.

There are, naturally, some other limits to the powers of the Ombudsman. For instance, when exercising powers under the *Ombudsman Act*, the Ombudsman cannot investigate and report on the conduct of judicial officers.³⁸ More specifically, as Jowitt has noted (albeit in a different context concerned with domestic violence and police powers being investigated by the Ombudsman), section 19(b) of the *Ombudsman Act* prevents the Ombudsman from

³⁴ *Ombudsman Act 1998* (Vanuatu) s 34(2).

³⁵ See PacLII database <www.pacii.org>; for further information on the subject matter of written reports see generally Edward R Hill, *Ombudsman of Vanuatu – Digest of Public Reports 1996-2000*, UNDP Governance and accountability project, January 2001.

³⁶ s (1)(d)-(e).

³⁷ *Leadership Code Act 1998* (Vanuatu) s 34(5); A common feature of Ombudsman in many jurisdictions is powers which are limited to recommendations only - see generally, Judge Anad Satyanand, 'Growth of the Ombudsman Concept' (1999) 3 *Journal of South Pacific Law* 1; Sir Kenneth James Keith, 'Development of the Role of the Ombudsman with Reference to the Pacific' (Speech delivered at the 22nd Australasian and Pacific Ombudsman Regional (APOR) Conference, Parliament House, Wellington, New Zealand, 9-11 February 2005).

³⁸ Section 1 of the *Ombudsman Act* specifically does not include judicial officers or courts in the definition of 'government agency'.

inquiring into why recommendations have not been acted upon or actions taken in response to recommendations.³⁹

The Vanuatu Leadership Code Act

In general terms a Leadership Code has been defined as a set of rules ‘to promote and regulate ethical values’ typically through establishing ‘criteria for defining, promoting and managing integrity; disclosure; government contracts; conflicts of interest; the application of public funds and benefits’.⁴⁰ Chapter 10 of the *Constitution* expressly provides for a ‘Leadership Code’ covering the conduct of leaders. The Code aims to prevent conflicts of interest and uphold the integrity of government in Vanuatu.⁴¹ Leader is defined in section 67 of the *Constitution* to include the President, Prime Minister, Ministers, Members of Parliament, and public servants (and others as prescribed by law). However, in respect of the President the position is more nuanced as section 34(1) of the *Leadership Code Act* expressly excludes the President from the role of the Ombudsman in investigating and reporting on the conduct of a Leader. In a further interesting point of note, the Ombudsman, while defined as a leader in section 5 of the *Leadership Code Act*,⁴² then has an express role in the investigation of complaints against leaders under section 34 of the Code.⁴³

The Parliament of Vanuatu passed the *Leadership Code Act* in 1998,⁴⁴ so there was a considerable period of delay in implementation from the commencement of the *Constitution* in 1980 until 1998 when the Act was passed. It is possible to conclude therefore that at least the standards contained in the *Constitution* relating to both the Ombudsman and the *Leadership Code* were initially aspirational.

³⁹ Anita Jowitt, *Documenting and Reporting Human Rights Abuses (Violence Against Women and Torture/Ill-Treatment) Around Efate*, Research Report, Transparency International Vanuatu Advocacy & Legal Centre, 2013.

⁴⁰ Rawlings, above n 14, 3, 7.

⁴¹ *Leadership Code Act 1998* ss 66-8.

⁴² Importantly the Ombudsman is not deemed a ‘public servant’ as the office of the Ombudsman is established under the Constitution rather than by a public service employment contract, see *Republic of Vanuatu v Bebe* [2014] VUCA 29

<<http://www.pacii.org/cgi-bin/sinodisp/vu/cases/VUCA/2014/29.html?stem=&synonyms=&query=Bebe>>.

⁴³ See also *Nari v Republic of Vanuatu* [2015] VUSC 132

<<http://www.pacii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/132.html?stem=&synonyms=&query=ombuds>>.

⁴⁴ Act 2 of 1998, commencing on 7 September 1998; and also Act 7 of 1999.

The powers conferred on the Ombudsman under the Code are extensive and strengthened by an enforcement capability through an application to the Supreme Court.⁴⁵ A decision by the Vanuatu Court of Appeal in 2014 upheld an earlier decision by the Supreme Court regarding the validity of provisions of the *Leadership Code Act*.⁴⁶ Graphically illustrating the gap between statutory powers and reality, Transparency International Vanuatu highlighted that by 2014 there had yet to be a prosecution under the Code and recommended that the Vanuatu government take action to ‘ensure that there are consequences for breaches of the Leadership Code’.⁴⁷ Significantly, in 2016 the Vanuatu Court of Appeal upheld convictions for breaches of the *Leadership Code Act* in *Tapangararua v Public Prosecutor*.⁴⁸

The Transparency International Vanuatu 2014 report also criticised the lack of action by the Ombudsman in upholding the Code. For example, it stated:

Lists of leaders who have filed or not filed annual returns are not consistently published in the Gazette. Even when leaders fail to file returns and the list is published, no further action is taken. The last ombudsman’s public report on this topic was published in 2009 and related to 188 leaders who had failed to file annual returns in 2007.⁴⁹

In a subsequent development, the Vanuatu Law Commission (VLC) reviewed this aspect of the Ombudsman’s operations and stated that the present system was ‘ineffective’ and made recommendations for reform.⁵⁰ The reason that the reporting mechanism has attracted the attention of such bodies (VLC and Transparency International Vanuatu) is that public reporting accomplishes the important function of upholding transparency and public accountability in Vanuatu and it is a recognition that continual refinement to make it effective is warranted.

⁴⁵ Ibid s 34(4).

⁴⁶ *Tapangararua v Public Prosecutor* [2016] VUCA 10
<[http://www.pacii.org/cgibin/sinodisp/vu/cases/VUCA/2016/10.html?stem=&synonyms=&query=title\(Tapangararua%20and%20Public%20Prosecutor%20\)>](http://www.pacii.org/cgibin/sinodisp/vu/cases/VUCA/2016/10.html?stem=&synonyms=&query=title(Tapangararua%20and%20Public%20Prosecutor%20)>).

⁴⁷ Transparency International Vanuatu, *National Integrity System Report*, 2014, 16, 19.

⁴⁸ *Tapangararua v Public Prosecutor* [2016] VUCA 10 [27].

⁴⁹ Transparency International Vanuatu, above n 47, 45.

⁵⁰ Vanuatu Law Commission Report, *Ombudsman and Leadership Code Act Legislative Review*, 02/2016, 122.

Right to information in Vanuatu

Another accountability measure that complements the functions of the Ombudsman is the existence of a formal mechanism to obtain access to government held information. Enabling the public to access government information allows them to be better informed about government and therefore able to assess when it might be appropriate to lodge a request for Ombudsman investigation. The establishment of a freedom of information regime, preferably accompanied by a public awareness campaign, provides citizens with a legal right to information and a formal process to access government held information. The existence of such legislation in Vanuatu will also act as a counter-balance to the ongoing existence of the *Official Secrets Act 1980* and its emphasis on the protection of classified material.⁵¹ The need for an access to information regime and the likely difficulties encountered by small island jurisdictions was recognised as early as 2000 by Professor Paterson.⁵²

In late 2015, national media and regional media organisations reported that the Vanuatu government, through the Office of Government and its Chief Information Officer, would be progressively implementing the National Right to Information Policy with associated legislation expected to pass Parliament in the imminent future.⁵³ An earlier proposed draft statute, the *Freedom of Information Bill 2006*, prepared by Transparency International Vanuatu and *Media Association Blong Vanuatu* did not obtain parliamentary approval due to a lack of parliamentary support. The Commonwealth Human Rights Initiative, while encouraging of the draft, prepared a report that contained recommendations for improvement.⁵⁴

It is therefore significant that the Parliament of Vanuatu's official website recorded that the *Right to Information Act* was passed by Parliament in late 2016, and the Act is available on the PacLII database.⁵⁵ Once operational this Act will provide additional mechanisms to inform the public about government decision-making and thus encourage expanded public

⁵¹ See generally, *Ombudsman v Kombe* [1998] VUSC 2; *Ombudsman v Kombe* [1998] VUSC 3 <[http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1998/3.html?stem=&synonyms=&query=title\(Ombudsman%20and%20Kombe%20\)](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/1998/3.html?stem=&synonyms=&query=title(Ombudsman%20and%20Kombe%20))>.

⁵² Don Paterson, 'Legal Challenges for Small Island Jurisdictions in Relation to Privacy, Freedom of Information and Access to Justice' (2000) 4 *Journal of South Pacific Law* 13 (1 January 2000).

⁵³ Reported by Loop Vanuatu on 20 August 2015 at <www.loopvanuatu.com> and the Pacific Media Assistance Scheme at <www.pacmas.org>.

⁵⁴ Commonwealth Human Rights Initiative, *Analysis of the Republic of Vanuatu Draft Freedom of Information Bill 2006 and Recommendations for Amendments*, May 2006.

⁵⁵ Available at <<https://parliament.gov.vu/index.php/icons/bills>> (accessed on 8 December 2017) & <[www.paclii.org/vu/legis/Right to Information Act 2016](http://www.paclii.org/vu/legis/Right%20to%20Information%20Act%202016)>, Act No. 13 of 2016.

accountability in Vanuatu. The creation of a legislative information access regime should be viewed as a positive development, even if the legislation and associated public sector practices are not perfect or ideal. As demonstrated by recent history this can be an area of reform on which it is difficult to garner parliamentary support. Thus, incremental change and the commitment to establish a statutory regime, can be influential in and of itself. This is similar to the idiom of ‘not letting perfect be the enemy of good’.

Other Vanuatuan public accountability institutions

There is also a broad range of institutions which strengthen and complement the functions of the Ombudsman and can also be regarded as having a role in upholding public accountability. In Vanuatu these include the Auditor-General, the Public Prosecutor, the Public Solicitor, the Public Service Commission, the Electoral Commission and the VLC. Similar to the Ombudsman some of these institutions are established in the *Constitution* (specifically the Auditor-General, the Public Prosecutor, the Public Solicitor, the Public Service Commission and the Electoral Commission) although none are given the same prominence as the Ombudsman which has its own Part within Chapter 9.

These other institutions can be considered part of the broad accountability system in Vanuatu. This is because the Public Prosecutor and Public Solicitor have potential roles in enforcing and remedying corruption in public office. Similarly, the VLC has a public accountability input when it recommends potential reforms to existing integrity mechanisms, for example the Ombudsman and the *Leadership Code*. The Auditor-General has specific responsibilities for the audit and reporting on expenditure of public money, while the Public Service Commission is responsible for the management and performance of public officials. Finally, the Electoral Commission has a key role in ensuring the democratic accountability of the electoral process in Vanuatu and thus the selection of parliamentary representatives. All of these various institutions have important roles and functions and together form part of a community with interests and connections to upholding public accountability.

Civil/community organisations in Vanuatu

Additionally, civil and community organisation in Vanuatu have a role in supporting the public accountability principles upheld by the Ombudsman. One way that domestic organisations and local branches of global bodies promote and support public accountability in Vanuatu is through their public reactions to alleged instances of corruption and

maladministration.⁵⁶ For example, the Vanuatu Association of Non-Governmental Organisations established a new group, the Vanuatu Corruption Commission. It explained that the formation of the Commission was prompted by prominent public scandals.⁵⁷ Other domestic groups which have made public statements following developments of concern in public accountability terms are Youth Against Corruption Vanuatu and Vanuatu's Women Against Crime and Corruption.

The most prominent international organisation operating locally in Vanuatu was Transparency International Vanuatu which, for example, issued a series of updates on the 'National Integrity System'.⁵⁸ Three reports (all issued in 2013) contained positive recognition of the existing accountability institutions and suggestions to assist the achievement of their potential.⁵⁹ The key role of development partners (principally France, Australia and New Zealand) providing targeted financial and public assistance can be demonstrated by the example of the French Embassy in Port Vila granting funding of Vatu 390 000 to Transparency Vanuatu to support good governance and enable the printing of three information booklets in Bislama.⁶⁰ Sadly since this important work, in 2017 Transparency International Vanuatu was officially described as a suspended chapter on the Transparency International website, meaning that it is no longer operational within Vanuatu.⁶¹ Thus there will be real challenges for Transparency International in order to continue important role previously performed by Transparency International Vanuatu given the absence of an effective and operational structure within Vanuatu.

RECENT DEVELOPMENTS IN VANUATU

Vanuatu Law Commission (VLC) review and report

⁵⁶ For a detailed discussion of corruption in the South Pacific see Robert Hughes, 'Corruption' in Anita Jowitt and Dr Tess Newton Cain (eds), *Passage of Change: Law, Society and Governance in the Pacific* (ANU Press, 2010) 35.

⁵⁷ Anti-corruption authorities, *New anti-corruption group set up in Vanuatu* <<http://www.acauthorities.org/news/new-anti-corruption-group-set-vanuatu>>.

⁵⁸ Transparency International, *National Integrity System Update – Ombudsman and Office of the Auditor-General*, Update #3, 27 September 2013, #2 20 September 2013 & #1 26 August 2013.

⁵⁹ Ibid.

⁶⁰ Transparency International Vanuatu News Release dated 31 October 2013 <www.transparencyvanuatu.org>

⁶¹ Transparency International, *Transparency Vanuatu Suspended* <https://www.transparency.org/whoweare/contact/org/nc_vanuatu>.

As explained above, the VLC also has an important role in public accountability through its capacity to undertake investigations and issue recommendations for law reform.⁶² It is not mentioned in the Vanuatu Constitution but is established by a specific Act – the *Law Commission Act*.⁶³ As a piece of normal legislation, amendments to the Act and even repeal of the Act can therefore be made by the subsequent passage of an Act of Parliament. A further vulnerability of the VLC is that there is no statutory compulsion for the government either to adopt the final recommendations nor indeed to respond to them.

In 2015, the VLC published two public Issues Papers – the first into the *Ombudsman Act* and the second into the *Leadership Code Act*.⁶⁴ In respect of the *Leadership Code Act*, the referral to the VLC was made by the Office of the Ombudsman. The inquiry was concluded and one final report covering both topics (Ombudsman and *Leadership Code*) was published in October 2016.⁶⁵ A total of 79 recommendations were issued - the majority concerned with the Ombudsman (the subject of 45 recommendations) and the remaining 34 on the *Leadership Code*.⁶⁶

The recommendations regarding the *Ombudsman Act* covered the qualifications, appointment process and conditions of employment for the Ombudsman with five recommendations – four of which suggest amendments to the *Ombudsman Act*.⁶⁷ All relate to increasing flexibility in who may be appointed and providing certainty about the nature of the office. Significant attention was then given to the function of the Ombudsman including complaints and proceedings and immunities.⁶⁸ The Report focused on improving coordination and cooperation between the Ombudsman, Public Prosecutor and Police. The VLC also recommended that the Ombudsman be invested with the power to appoint its own officers and other staff (a power conferred in the original Act but not its successor).⁶⁹ Finally, the report recommended that the Ombudsman should not have responsibility for overseeing

⁶² See Kalsakau A, 'The Birth and Rebirth of Law Reform Agencies: The Establishment of Vanuatu's Law Reform Commission' (Paper presented at the Australasian Law Reform Agencies Conference, September 2008).

⁶³ Originally introduced as JR 20 of 1980, with a commencement date of 30 July 1980.

⁶⁴ Vanuatu Law Commission, *A Review of the Ombudsman Act*, Issues Paper No 01 of 2015; Vanuatu Law Commission, *Leadership Code Act*, Issues Paper No 02 of 2015.

⁶⁵ Vanuatu Law Commission, *Ombudsman and Leadership Code Act Legislative Review*, No. 02/16, October 2016.

⁶⁶ Ibid 155-66.

⁶⁷ Ibid recommendations 1, 2, 4 & 5 concern amendments to the Act, while recommendation 3 is that the Act remain unaltered with no age requirement for the Ombudsman.

⁶⁸ Vanuatu Law Commission, *Ombudsman and Leadership Code Act Legislative Review*, No. 02/16, October 2016, recommendations 6 – 36 inclusive.

⁶⁹ Ibid recommendations 37 – 42 inclusive.

human rights issues and that instead a separate, independent National Human Rights Committee be established.⁷⁰

In respect of the *Leadership Code Act* there was a detailed and thorough review of the Act. The final report described the Act as ‘outdated and unsatisfactory’.⁷¹ The report’s recommendations regarding this Act centred on five main areas:

- Definition of leaders;
- Breaches of the *Leadership Code*;
- Annual returns;
- Investigation and prosecution of leaders; and
- Punishment of leaders.

While acknowledging there was imprecision in the definition of leaders in the Act, the VLC determined that this was a matter more appropriately left for the courts to interpret. This will ensure future flexibility in the application of the Act. In respect of breaches, the VLC recommended that breaches be separated into two categories so that there is a distinction between serious and less serious breaches.⁷² Less serious breaches would then be dealt with by a new Leadership Tribunal while serious breaches would be a matter for the courts. As noted previously in this analysis there has been a consistent failure of leaders to file annual reports and there has been little enforcement of this obligation. To improve the transparency that annual reports would provide, the VLC recommended shifting the collection of such reports to the Ombudsman.⁷³ In respect of investigation and prosecution of leaders, the principal recommendation was the need for an MOU between the Ombudsman, Public Prosecutors and Police (also referred to above on the Ombudsman’s general investigation powers). Finally, the VLC considered the issue of punishment and recommended increasing the fines but leaving the definitions unchanged to be interpreted by the courts.⁷⁴

However as explained previously, without a statutory obligation to respond to reports of the VLC, it will be for the government alone to decide what, if any, measures will be implemented. The important contribution of the VLC may go unrealised, as did past reviews

⁷⁰ Ibid recommendations 43-5 inclusive.

⁷¹ Ibid 19 & recommendations 1-4, pt 2.

⁷² Ibid 19 & recommendations 5-8 pt 2.

⁷³ Ibid 20 & recommendations 9-19.

⁷⁴ Ibid recommendations 20-34.

of the Ombudsman conducted in 2001, 2002 and 2004.⁷⁵ This history can be interpreted in both a positive and a negative manner. It is positive in the sense that VLC has shown consistent and enduring support for the Ombudsman and it highlights the capacity of the VLC to publicly foster a public accountability culture in Vanuatu. However, the lack of government response is also a negative in terms of achieving meaningful reforms. It concretely demonstrates that government support for a good public accountability environment is crucial where legislative action has been identified as needed, given the government has control over the legislative agenda.

Another concern about the feasibility of the recommendations being implemented is the concomitant need for adequate resourcing of the new Leadership Tribunal and also the Ombudsman's office in the eventuality it received the additional responsibility of collecting and enforcing the annual reports of leaders. This once again demonstrates the central influence of the government, given its control over public expenditure and budgetary allocations.

Recent political developments and associated litigation

Other recent events concerning public accountability worthy of brief comment include the political drama which unfolded in late 2015 involving the conviction of a number of Members of Parliament and then the subsequent pardoning of the same by the Acting President (whilst the President was absent overseas), and the issuing of a suspension order against the Ombudsman by the Acting President at the same time.⁷⁶ The legality of the latter order was questioned by the Ombudsman, and whilst the former may be technically constitutional it is questionable in terms of public confidence in the political system. The Vanuatu Supreme Court was involved in a number of related cases which intersected with these developments, illustrating the close links between political events and the importance of an independent judiciary.⁷⁷ Contemporaneous articles authored by Professor Paterson and a

⁷⁵ Vanuatu Law Commission, *Ombudsman and Leadership Code Act Legislative Review*, No. 02/16, October 2016,17 referring to the Wiltshire Review in 2001, the McDowell Report in 2002 and the Review Committee Report in 2004.

⁷⁶ See Don Paterson, 'Chronicle of the Months of Political and Constitutional Crisis in Vanuatu 2014' (2015) 2 *Journal of South Pacific Law* C-3, 6; Lee-Anne Sackett, 'Vanuatu Constitutional Cases Nos 6 and 7 of 2015: Article 38 Pardons and Multilingual Legal Interpretation Principles' (2015) 2 *Journal of South Pacific Law* C-1, 1 & 2.

⁷⁷ *Nari v Republic of Vanuatu* [2015] VUSC 132

<[*Public Prosecutor v Moana Kalosil and others* - Judgment as to verdict \[2015\] VUSC 135](http://www.paclii.org/cgibin/sinodisp/vu/cases/VUSC/2015/132.html?stem=&synonyms=&query=title(Nari%20and%20Republic%20of%20Vanuatu%20)>;</p>
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USP academic consider in detail the most significant of these cases and the implications arising from them.⁷⁸ Additionally, academics Forsyth and Batley have also examined these recent developments and the subsequent court cases to determine what they reveal about checks and balances in Vanuatu governance.⁷⁹ They conclude that ‘the existing checks and balances on the power of the executive ... have provided Vanuatu’s system of governance with a demonstrable degree of resilience.’⁸⁰

One case arising from this sequence of events in particular warrants special mention in the context of this article with its primary focus on the Ombudsman – it is *Nari (and others) v Republic of Vanuatu*.⁸¹ In *Nari*, a judge of the Vanuatu Supreme Court considered the nature of the Ombudsman’s role and procedures established in the *Ombudsman Act* and ruled that the provisions in the Act did not breach the fundamental rights guaranteed in the *Constitution*, although the procedures required by the *Ombudsman Act* were not followed. Justice Fatiaki quoted an earlier decision of the Vanuatu Supreme Court from 2001 in *Ombudsman v Batick*:

The purpose of the *Leadership Code* and the (*Ombudsman*) *Act* are, among other things to prevent corruption in ‘high places’ and the crippling effects it has on the economic and social systems of the country.⁸²

While there was a related subsequent Court of Appeal decision,⁸³ the judgment of Justice Fatiaki remains relevant in that it highlighted a judicial observation on the social and civic desirability of a strong, independent and effective Ombudsman and on this aspect the Court of Appeal decision did not disagree or overturn.

<<http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/135.html?stem=&synonyms=&query=kalosil>>; *Public Prosecutor v Moana Kalosil and others* - Sentence [2015] VUSC 149

<<http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/149.html?stem=&synonyms=&query=kalosil>>; *Kalosil v Republic of Vanuatu* [2016] VUSC 150

<<http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2016/150.html?stem=&synonyms=&query=kalosil>>.

⁷⁸ Paterson & Sackett, above n 76.

⁷⁹ Miranda Forsyth & James Batley, ‘What the Political Corruption Scandal of 2015 Reveals about Checks and Balances in Vanuatu Governance’ (2016) 51(3) *Journal of Pacific History* 255.

⁸⁰ *Ibid*, 277.

⁸¹ *Nari v Republic of Vanuatu* [2015] VUSC 132

<[http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/132.html?stem=&synonyms=&query=title\(Nari%20and%20Republic%20of%20Vanuatu%20\)](http://www.paclii.org/cgi-bin/sinodisp/vu/cases/VUSC/2015/132.html?stem=&synonyms=&query=title(Nari%20and%20Republic%20of%20Vanuatu%20))>;

⁸² *Ibid* [84].

⁸³ *Kalosil v Public Prosecutor* [2015] VUCA 43; Criminal Appeal Case 12 of 2015 (20 November 2015).

Ultimately the remaining numerous, complex legal issues raised by these events and in the resulting cases did not require authoritative determination as a snap election was called for 22 January 2016 and a new government was elected by the voters in Vanuatu.

OTHER PACIFIC OMBUDSMEN

The pervasiveness of the Ombudsman concept in the Pacific is underlined by the fact that seven of the 12 USP members (this figure includes Vanuatu) and PNG have established an Ombudsman or equivalent institution. The following table details the title of the office, the enabling legislation and a summary of the appointment process for each of the six USP members and PNG, which have an Ombudsman or equivalent (information for Vanuatu has not been included in the table as it was subject to detailed consideration in the above analysis).

Table 1: Comparison of Ombudsman provisions in six USP members and PNG

Comparator	Enabling Legislation	Appointment Process
Cook Islands	<i>Ombudsman Act 1984</i>	Appointed by the Head of State on recommendation of the legislature. ⁸⁴
Fiji ⁸⁵	<i>Constitution 2013</i> ⁸⁶	Appointed by President, on the advice of the Judicial Services Commission following consultation by it with the Attorney-General. ⁸⁷
Samoa	<i>Ombudsman (Komesina O Sulufaiga) Act 2013</i> ⁸⁸	Appointed by the Head of State on recommendation of the Legislative Assembly. ⁸⁹

⁸⁴ Cook Islands, *Ombudsman Act 1984* s 3.

⁸⁵ In Fiji, the title is Accountability and Transparency Commissioner, not Ombudsman although the functions are substantially similar.

⁸⁶ In Fiji, there have been several written constitutions since independence in 1970. The previous constitution was enacted in 1997 (*1997 Constitution of Fiji*) and contained provisions establishing an Ombudsman in ss 157-65. That Constitution was abolished in 2009. In 2013, a new constitution came into effect, and under s 121 of the 2013 Constitution the Accountability and Transparency Commission, which is in effect an Ombudsman, was established. Also relevant is the *Code of Conduct Bill 2016*. The Bill has been tabled in Parliament and is currently before the Parliamentary Committee on Justice, Law and Human Rights for consideration.

⁸⁷ *Fiji Constitution 2013* s 121(2).

⁸⁸ This Act repealed and replaced the Samoan *Ombudsman (Komesina o Salufaiga) Act 1988*.

Solomon Islands	<i>Constitution of Solomon Islands & Ombudsman (Further Provision) Act 1980</i>	Appointed by the Governor-General after consultation with the Speaker of the Parliament & the chairpersons of the Public Service Commission, Judicial and Legal Services Commission. ⁹⁰
Tonga	<i>Ombudsman Act 2016</i> ⁹¹	Appointed by the Speaker with the consent of the Legislative Assembly. ⁹²
Tuvalu	<i>Leadership Code Act 2008</i> , specifically part IV	Chief Ombudsman appointed by the Head of State, acting on advice of a committee comprising of the Prime Minister (chairperson), the Speaker, the Chief Justice, the Chairman of the Public Service Commission & the President of the Ekalesia Kelisiano o Tuvalu. ⁹³
PNG	<i>Constitution 1975</i> ⁹⁴ & the <i>Organic Law on the Ombudsman Commission</i>	Head of State on advice which must come from a special ad hoc body called the Ombudsman Appointments Committee.

Of the seven Pacific nations and territories with Ombudsman or equivalent institutions, four have embedded the institution into their respective constitutions. These four are Vanuatu (as

⁸⁹ Samoa *Komesina O Sulufaiga (Ombudsman) Act 2013* s 7.

⁹⁰ *Constitution of the Solomon Islands* s 96.

⁹¹ The Tongan *Commissioner for Public Relations (Amendment) Act 2016* amended the title of the *Commissioner for Public Relations Act 2001* to the *Ombudsman Act 2016*.

⁹² Section 5 of the Tongan *Commissioner for Public Relations (Amendment) Act 2016*, now the *Ombudsman Act 2016*.

⁹³ Tuvaluan *Leadership Code Act 2008* s 40. Ombudsman Commissioners (Junior) shall be appointed for three years by the Head of State, acting in accordance with the advice of the Public Service Commission given after consultation with the Chief Ombudsman per s 41 of the *Leadership Code Act 2008*.

⁹⁴ *Constitution of the Independent State of Papua New Guinea 1975* pt VIII, div 2.

analysed in detail above), Fiji, the Solomon Islands and PNG. Solomon Islands has a structural model for the Ombudsman that is similar to Vanuatu, with specific provisions on the Ombudsman in Chapter ix, sections 96-99 of the *Constitution of Solomon Islands*. This entrenchment is then supplemented by a specific Act – the *Ombudsman (Further Provision) Act 1980*. Fiji has embarked on a somewhat different model and title for the institution, with specific provisions contained in a Code of Conduct Bill rather than a stand-alone Ombudsman Act. PNG has embedded the Ombudsman Commission into the Constitution in sections 217-220 inclusive and it also has the *Organic Law on the Ombudsman Commission* which has a higher status than a normal Act of Parliament.

There are five Pacific USP nations and territories which do not currently have an Ombudsman, though in four of these there are nonetheless other oversight and accountability institutions. Kiribati has a Public Service Commission and Auditor-General. The Marshall Islands has an Auditor-General's Office. Nauru has a Department of Audit. Niue has a Public Service Commission. Thus, Tokelau stands as the only USP member without a dedicated public service or audit institution meaning it has minimal structures to support and encourage public accountability.

In 2009, a report was published by the Australian Ombudsman on an investigation into complaint handling mechanisms in Pacific Island nations and territories without an Ombudsman.⁹⁵ Selection of the included nations and territories was based upon membership of the Pacific Island Forum, which is different to USP members, but for the purposes of this analysis did include Kiribati, Marshall Islands, Nauru and Niue.⁹⁶ In each of these nations and territories the position as at May 2009 was reported along with next steps to foster good government administration. The Report referred to the Pacific Ombudsman Alliance, which is a regional organisation describing itself as 'a service delivery and mutual support organisation for Ombudsman and allied institutions of countries that are members of the Pacific Islands Forum' and which 'strengthens cooperation within the community of Pacific

⁹⁵ Commonwealth Ombudsman, *Complaint Handling in Pacific Island Nations with an Ombudsman*, Report of the 2008 Study Tour co-ordinated by the Office of the Commonwealth Ombudsman with members of the Pacific Ombudsman Network, May 2009.

⁹⁶ It also included Tuvalu, which subsequently created an Ombudsman in 2014 refer to *Table 1: Comparison of Ombudsman Provisions in Six USP Members & PNG* above.

Ombudsman and allied institutions’.⁹⁷ It is relevant to note that although the Pacific Ombudsman Alliance has a website, there has been no news items uploaded since 2014.⁹⁸

The Australian Ombudsman’s Report also acknowledged the proposal for a regional Ombudsman service was recommended in the *Pacific Plan for Strengthening Regional Cooperation and Integration* (‘the Pacific Plan’).⁹⁹ The Pacific Plan was adopted in 2005, revised in 2007 and reviewed in 2013. After this review the *Framework for Pacific Regionalism* (‘the Framework’) was adopted in 2014 and commenced in 2015. It states that it:

... replaced the Pacific Plan and is intended to ‘support focussed political conversations and settlements that address key strategic issues, including shared sovereignty, pooling resources and delegating decision-making ... Rather than providing a list of regional priorities, it sets out a robust process through which regional priorities will be identified and implemented.’¹⁰⁰

Unlike the Pacific Plan, the Framework does not expressly refer to the Ombudsman, so it may be concluded that the regional Ombudsman has faded as an express initiative, and there has been an emergence of the locally tailored solutions detailed at the start of this paragraph.

CONCLUDING OBSERVATIONS

Public accountability is now a critical, universal and established concept in global development discourse and public law research/publications.¹⁰¹ This is evidenced by the world-wide trend towards implementation and establishment of public accountability institutions whether in nations with common law or civil law jurisdictions or pluralistic legal systems. This analysis and the recent developments in Vanuatu underline the critical importance of public accountability institutions, such as the Ombudsman, and the sometimes difficult path taken by those who perform public accountability duties. Such office holders

⁹⁷ Information retrieved from the website of the Pacific Ombudsman Alliance at <<http://www.pacificombudsman.org/>> (accessed on 6 October 2017).

⁹⁸ See <<http://www.pacificombudsman.org/newss>>.

⁹⁹ *Pacific Plan for Strengthening Regional Cooperation and Integration* (2005) <<https://www.adb.org/sites/default/files/linked-documents/robp-pac-2010-2013-oth01.pdf>>. The Australian Ombudsman 2009 report described the ‘Pacific Plan’ as a living document that forms the basis for ongoing strengthening of regional cooperation and integration efforts. Therefore, the ‘Pacific Plan’ provided an aspirational target for member states to continuously work towards. It has since been superseded.

¹⁰⁰ *Framework for Pacific Regionalism* (2014), 2

<http://www.forumsec.org/resources/uploads/embeds/file/Framework%20for%20Pacific%20Regionalism_booklet.pdf>.

¹⁰¹ See generally, Wesley, above n 1, A-2.

and the staff who support them need public support - especially from community groups - and sustained government funding. There is also a key role for public leaders (in either formal or informal civil organisations), lawyers, law students and legal academics in supporting and advocating for public accountability institutions.

There is no simple, cheap or quick solution to improving public accountability but rather it is a process of building upon already solid foundations and a range of institutions and mechanisms, combined with domestic support as well as that from regional nations and organisations, and development partners. Whilst the existing public accountability system in Vanuatu is not perfect and operates with limitations, the constitutional embedding of the Ombudsman and the *Leadership Code* does provide a more permanent foundation for these important institutions than ordinary legislation would provide. A complex issue such as achieving good governance requires a complex web of solutions and support of all leaders throughout society. Indeed, there has been recognition that good governance can be fostered alongside traditional culture in a ‘hybrid modernity in which Western notions of rationality and ethics co-exist with resilient indigenous ways of knowing and being’ which honour communal responsibilities for example.¹⁰²

The above analysis documents that there are many different models that have been adopted amongst USP members to improve public accountability and foster integrity in government decision-making. All USP members have recognised the importance of complaint handling mechanisms and a majority have created Ombudsman or similar institutions. Of those with such institutions, three USP members have constitutionally entrenched provisions which provide an additional level of independence and protection. An Ombudsman will usually have the defining characteristic of self-initiated investigations, also called ‘own motion powers’ and this ability extends the Ombudsman powers beyond those exercised by a Public Service Commission or Auditor-General. It is for that reason, combined with the benefit of institutional independence, that the creation of a separate Ombudsman or similar institution has evolved to become the dominant model of investigation in the Pacific. Of course, these institutions also operate within a broader judicial system and the inherent powers of courts to conduct judicial review of government/executive decisions. Together, they form a community of accountability.

¹⁰² Ibid A-5.

By taking a longer-term view of the objective of public accountability, this analysis is not intended in any way as a criticism of the progress made by any Pacific nation in terms of strengthening public accountability, but rather a formal recording of the different approaches taken to public accountability within the Pacific (with the Vanuatuan Ombudsman as a case study), and the potential for further strengthening of national commitments to the ideals of public accountability and integrity. The limitations of existing public accountability mechanisms have been identified throughout the analysis and these stand as areas for future improvement. The case study of the Vanuatuan Ombudsman adopted in this analysis provides one example where the constitutional entrenchment has been able to provide a firm foundation for public accountability – initially without the passing of specific Acts of parliament. It can be argued that the Constitutional enshrinement of the Vanuatuan Ombudsman's functions has assisted the office and its activities to withstand constitutional challenges alleging it infringes on fundamental rights also guaranteed in the *Constitution*.

That said, there is no certain or infallible method for upholding public accountability as legislation, common law and even written constitutions can be susceptible to change or even neglect in any nation. Care must also be exercised to avoid simplistic solutions or solutions that claim to be universalist – such solutions are at risk of cultural inappropriateness and leading to institutional transplants without substance and effect in the local communities they seek to serve.¹⁰³ Finally, constitutional embedding and endowment with legislative powers will not of themselves lead to a successful Ombudsman. What will also be a necessity is political will from the government, academics and public institutions to support the operations of the Ombudsman. Challenges for Ombudsman offices can arise in the areas of staff and other physical resources, budget allocations, technical knowledge, and at times government obstruction or inaction.¹⁰⁴

However, the foundations that these various elements provide can be the base for sustained strengthening in public accountability - like a tree that will grow stronger if it is planted in good soil. Good soil though is not of itself sufficient, trees require a complete, holistic environment in order to thrive.

¹⁰³ See generally, Sheehy and Maogoto, above n 11, 133, 138.

¹⁰⁴ See generally, Prasad, above n 20, 124, 126.